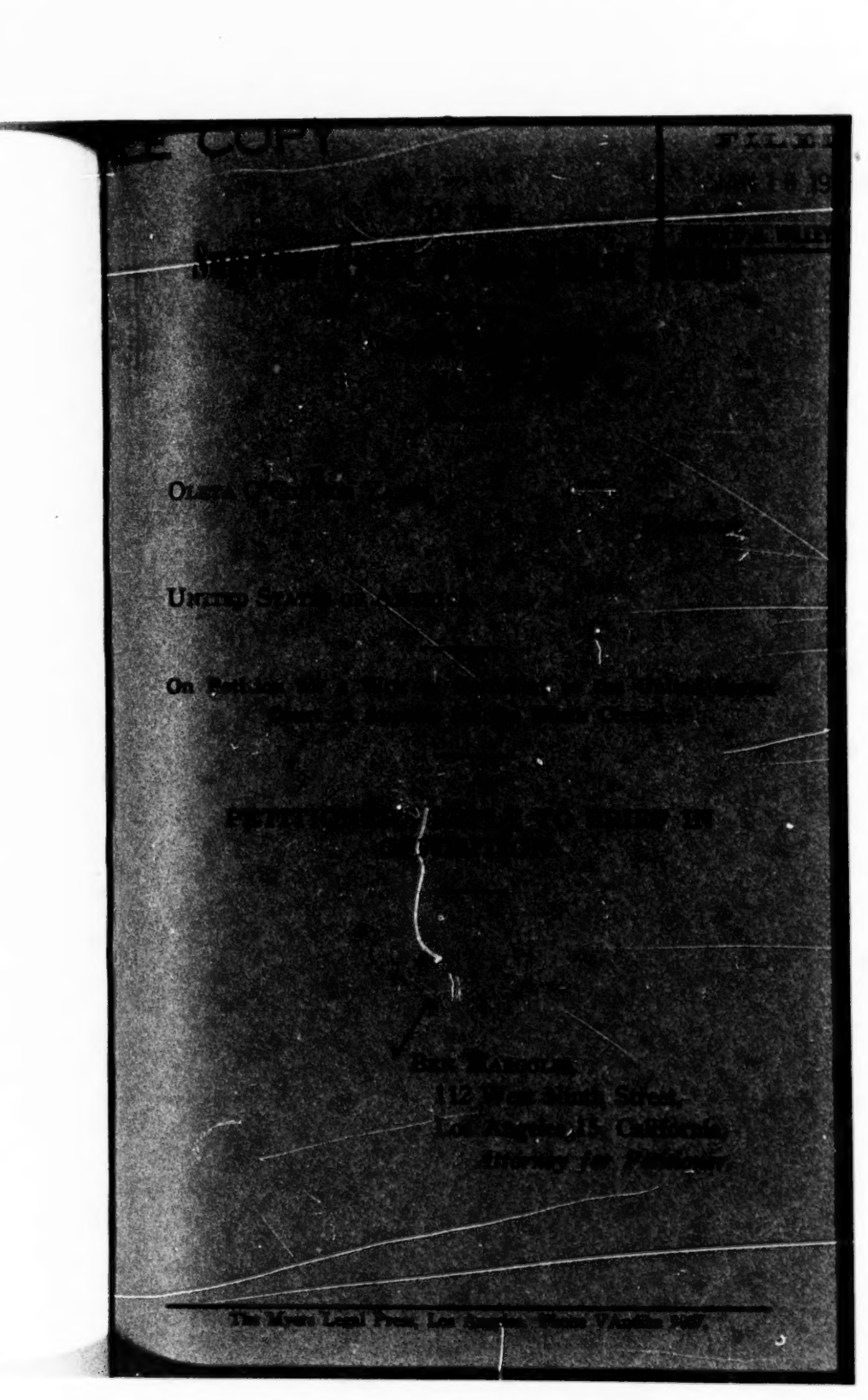

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IN THE

Supreme Court of the United States

October Term, 1955

No. 547

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION.

I.

The contempt charges involved four questions asked on one day and eleven questions put two days later during the same cross-examination. There are at least three distinct possibilities as to the number of contempts involved. The first, that there was only a single contempt, is the petitioner's position. The second is that there was one contempt on the first day and another single contempt on the subsequent one; the third, that each question involved a separate contempt, unless two or more questions concerned the same individual and were otherwise substantially identical. Respondent adopts one of the two latter views but does not state which one.

However, respondent's reliance on *United States v. Costello,* 198 F. 2d 200 is some indication that it adopts the view that on each day there was one contempt. In the cited case, the refusal to testify was held to constitute a single separate offense on each day, and multiple counts based on several questions on a single day were reversed. The questions there like those here involved different persons and related to different aspects of association.[1] The Court said:

> ". . . when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

Here the petitioner made her position clear at the outset that she would not answer a question which had the effect of her informing on a person as a Communist. Answers to all the questions not answered would have had the effect to which she, from the beginning, refused to lend herself. Her repeated refusals therefore

> "can not be considered as anything more than expressions of [her] intention to adhere to [her] earlier statement and as such was not separately punishable."

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[1]One question was whether the witness had a meeting with William O'Dwyer; another was whether he knew James Moran, and a third, whether he knew Frank Bals.

In *Costello* the witness refused to testify at all. Petitioner's initial refusal was far less comprehensive and embraced only an extremely limited kind of questions, but it did extend to all the questions she thereafter refused to answer just as Costello's did to all questions put to him. If petitioner had said when the first question involved was put to her that she would not answer any further questions at all, there could have been only a single offense. It would be odd indeed if, by restricting her refusal to a small segment of her possible cross-examination, she opened herself up to multiple contempts for innumerable questions within that limited area, while if she refused to testify at all, she could only be found guilty of one offense. It would seem logical therefore that by relying on *Costello,* respondent manifests an intent not to adopt the position that each question presents a separate contempt. Otherwise its position conflicts with *Costello,* and review is required to resolve that conflict.

Respondent's probable reliance on the theory of two separate offenses flows from a misreading of *Costello.* That case is not authority for the proposition that in a single proceeding, without intervention of new factors giving the refusals a different setting, the refusal to answer two questions constitute a single or double offense depending on the mere happenchance as to whether they are asked on the same or different days, or upon the choice of the prosecutor to multiply offenses by putting the questions at separate sessions.

In *Costello* on the first day, a doctor's certificate was produced stating that "the defendant was suffering from acute laryngotracheitis and that he should remain in

bed." (*Ibid.*, p. 203.) On the next day that physician testified before the Committee

> "that in his opinion Costello was capable of testifying for an hour or so a day. The defendant was then called before the Committee and informed of this testimony, but he presented another certificate, this time from his regular physician, stating that in the latter's opinion sustained conversation by the defendant would be dangerous to his health." (*Ibid.*, p. 203.)

Then he again refused to answer all questions. It is plain that his second refusal occurred under circumstances quite different from the first and presented a wholly new situation, not merely the coincidence that the questions were put on different days.

It is not surprising that under these circumstances the issue of multiple offenses as between the two days appears not even to have been raised. Here it has been raised because the setting when the two sets of questions were put was identical. Petitioner was undergoing the same cross-examination. Nothing had occurred in the interim which had any bearing on the position she took at the outset. To permit the questions to be considered as separate offenses because they were asked on different days is to confer upon the prosecutor the power to determine whether identical conduct of a defendant shall be penalized as one or as several offenses.

None of the other cases cited by respondent on this issue considered or decided the issue of law under consideration here. *Fisher v. Pace*, 336 U. S. 155 and *United States v. Bollenbach*, 125 F. 2d 458, involved several acts of misconduct in court. The problems arising

out of each situation are quite dissimilar from those arising out of a refusal to answer a certain class of questions followed by the repeated putting of questions in that class. *Emspak v. United States,* 349 U. S. 190 did not reach this point because there was a single punishment for the large number of counts. The pleading of several counts were only a single offense is punishable is, of course, proper practice. (*United States v. Orman,* 207 F. 2d 148, 160 (C. A. 3, 1953). *Cf., Lawson v. United States,* 176 F. 2d 49, 51 (C. A., D. C., 1949).) This is a far different thing from treating some of the questions as one offense and the others as a separate independent offense. Here this is precisely what was done by both the trial and appellate courts.

The trial court proceeded in civil contempt on the first day's questions and also in criminal contempt. (See fn. 6, p. 6, Br. for U. S. in Opposition.) In reversing that judgment the Court of Appeals held that because the trial judge did not notify the Petitioner that he would hold her in criminal contempt at the same time that he sentenced her in civil contempt on the first day's questions he could not thereafter proceed criminally with respect to that offense. (App. F. to Pet. pp. 30, 33-34.) The judgment in this case would necessarily have fallen, too, if the offense had been, according to the opinion of the appellate court, a single offense. Therefore this judgment was affirmed only because the Court deemed the offense separate.

The question as to whether there was more than one offense presents important questions which should be decided by this Court.

II.

Respondent does not dispute the rule that the court is without power to impose punitive punishment in proceedings essentially civil in character and purpose. (Rep. Br. p. 15.) Respondent argues, however, that "any contempt has both civil and criminal characteristics." (Rep. Br. p. 15.) This begs the question because this Court has constantly held that if the *dominant* purpose of the contempt proceedings is to coerce the performance of an act for the benefit of a party litigant, then the proceedings must be deemed civil in character even if the form and incidental effect of the proceedings may have been a vindication of the court's authority. (Pet. pp. 23-25.)

On the real issue in the proceeding, the respondent points only to the form of the contempt order and to an initial statement of the court that it expected to treat the refusals to answer on June 30 as criminal contempt. The record however shows unequivocally, despite the form of the contempt order and the court's statement, that the principal purpose and intent of the proceeding was to compel the petitioner to answer the questions propounded to her by the prosecution during the cross-examination. The court stated time and again in many ways throughout all the contempt proceedings, and even in supplementary proceedings seeking remand, that the answers "have undeterminable potential value to the plaintiff in the criminal case now pending on appeal." (Pet. p. 24.) The record so manifestly establishes the main purpose of the trial court in this proceeding, as well as the other contempt proceedings, to coerce the answers of petitioner after trial that respondent is left with no other recourse than to ignore the record. (See Statement of the Case, Pet. pp. 4-17.)

Respondent makes no claim that the proceeding was solely punitive and it presents nothing from the record to establish that the principal purpose of the proceeding was punitive. On the other hand, the record is undisputably clear and abundant that the dominant purposes was coercive. Under such circumstances, the substantial question presented here is whether such punitive punishment in a contempt proceeding essentially civil is not a violation of the letetr and spirit of 18 U. S. C., Section 401, contrary to the applicable decisions of this Court, and a deprivation of petitioner's liberty without due process of law.

III.

(a) Petitioner argues that punishment for summary contempt is within the discretion of the trial court and appellate courts will not intervene "unless there has been an abuse of judicial discretion." (Rep. Br. p. 18.) The claim here is that the sentence of one year imprisonment for refusal to answer similar questions on June 30 during the cross-examination of petitioner was a manifest abuse of discretion. (Pet. pp. 26-32.) Respondent states the problem but does not answer it.

(b) Respondent argues that the sentence is not excessive because 18 U. S. C., Section 402 which provides a maximum sentence of six months or fine of $1,000, or both, for indirect contempts expressly excepts contempt committed in the presence of the court. Respondent would have this Court assume therefore that the extent of punishment in summary contempt cases is unfettered and without standards. The history of the enactment of 18 U. S. C., Section 401 (Pet. pp. 20, 27) leads to an opposite conclusion. It is true that the six-month limit of imprisonment in Section 402 does not apply here, "though

it ought to have great weight in punishing criminal contempts" under Section 401. (*Ryals v. United States*, 69 F. 2d 946 (C. A. 5, 1934).)

(c) Respondent states that the maximum sentence for legislative contempts (18 U. S. C., Sec. 192) is twelve months and suggests that measured by this standard the sentence here was not excessive. It should be noted, however, that in legislative contempts a maximum of twelve months has been set by Congress despite the fact that the accused in such case is entitled to be tried under an indictment, entitled to confrontation and cross-examination, entitled to subpoena witnesses and present evidence in his own behalf, entitled to be tried before an impartial judge and jury and may be convicted only upon proof of guilt beyond a reasonable doubt. A summary contempt proceeding before a court is stripped of these normal requirements of due process and the punishment is imposed by the very court whose dignity has allegedly been affronted. Reason and policy would seem to dictate a standard far more restrictive on the extent of punishment in summary contempt of court cases than in legislative contempt prosecutions.

(d) Respondent suggests that where elements of "misbehavior" are involved, this Court cannot recreate the real situation from a "cold record"; that the trial judge "may well have felt" that the petitioner took the stand intending not to answer certain questions and that her "persistent refusal was part of a course of conduct to flout the authority of the court." The difficulty with respondent's position is that there is not a semblance of evidence in the record to support its conclusions, and indeed its brief is barren of any record reference to support its conjectures. The entire transcript of the criminal

trial is now on file in this Court. Nos. 308, 309, 310. The transcript of the records in all three contempt proceedings have also been filed with this Court. An examination of these records will reveal that there was not the slightest misbehavior or misconduct on the part of this petitioner. Neither of the courts below made any such finding. Indeed the trial court affirmatively indicated that it understood the scruples of petitioner. (Pet. p. 7.) Petitioner's refusal to answer certain questions was no part of a course of conduct to flout the authority of the court, for aside from her unwillingness to identify persons as members of the Communist Party she answered all other questions put to her on cross-examination fully and frankly. (Pet. pp. 5-6.)

The respondent has declined to acknowledge that there are any standards by which to test the excessiveness of a punitive sentence in a summary contempt proceeding. In effect, while conceding that a sentence may be reviewed when there is "an abuse of judicial discretion," respondent is in reality arguing that such discretion can never actually be reviewed. Respondent ignores the history of 18 U. S. C., Section 401, and the plain legislative intent to limit the drastic power to punish for summary contempt; has ignored the record which demonstrates that there was no actual obstruction to the performance of judicial duty; has glossed over the absence of any misbehavior or disrespect on the part of petitioner by conjecturing some undisclosed intent to flout the authority of the court; has avoided discussion of the fact that the sole reason for refusal to identify persons as Communists was a matter of conscience; and simply refused to consider the uniform federal and state legal precedents which affirm the view that sentences such as the one which was

imposed here is far in excess of self-imposed limits set by the courts in contempt proceedings. (Pet. pp. 26, 32, App. H.)

It is submitted that the issue here presents questions which loom large in the administration of justice in contempt proceedings in the federal courts and should be decided by this Court. In no other area, perhaps, is it so important that "decent and civilized" standard be prescribed by this Court.

IV.

The respondent has made no answer to Point IV of the petition (pp. 33-35).

Conclusion.

It now appears clear that the Court of Appeals has rendered a decision in conflict with the decision of other courts of appeals on the same matter, and has decided a federal question in conflict with applicable decisions of this Court. Moreover, the Court of Appeals has so far sanctioned such a departure from the accepted and usual course of summary contempt proceedings as to call for an exercise of this Court's power of supervision. The petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.